

UIIdaho Law Digital Commons @ UIIdaho Law

Idaho Supreme Court Records & Briefs

3-4-2008

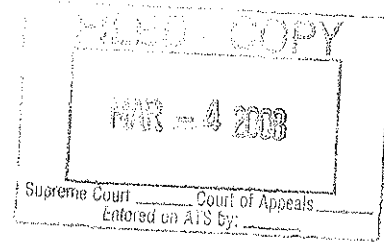
Spencer v. Jameson Respondent's Brief Dckt. 34517

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Spencer v. Jameson Respondent's Brief Dckt. 34517" (2008). *Idaho Supreme Court Records & Briefs*. 1656.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/1656

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.



IN THE SUPREME COURT OF THE STATE OF IDAHO

LAWRENCE SPENCER,

Petitioner,

vs.

DEE JAMESON, an Individual, DAVIDSON
TRUST CO., CUSTODIAN FOR IRA/SEP
ACCOUNT NO. 68-0811-30, and JAMES A.
RAEON, SUCCESSOR TRUSTEE,

Respondents.

SUPREME COURT DOCKET NO. 34517

KOOTENAI COUNTY NO. CV06-3304

RESPONDENT DEE JAMESON'S BRIEF ON APPEAL

Appeal from the District Court of the First Judicial District
Of the State of Idaho in and for the County of Kootenai

HONORABLE LANSING L. HAYNES
District Court Judge

Attorney for Appellant

IAN D. SMITH, ISB 4696
Attorney at Law
608 Northwest Blvd., Suite 101
PO Box 3019
Coeur d'Alene, ID 83816-3019

Attorney for Respondent Dee Jameson

MICHAEL R. CHAPMAN, ISB 5972
Chapman Law Office, PLLC
1110 W. Park Place, Suite 221
PO Box 1600
Coeur d'Alene, ID 83816

Attorney for Respondent Davidson Trust

BARRY MCHUGH, ISB 3469
Elsaesser Jarzabek et al.
1400 Northwood Center Court, Suite C
Coeur d'Alene, ID 83814

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	1
	A. Nature of the Case	1
	B. Course of Proceedings Below	1
	C. <i>Statement of the Facts</i>	3
II.	ISSUES ON APPEAL	5
	A. Whether the District Court properly granted Summary Judgment in favor of the Defendants?	5
	B. Whether Jameson is entitled to an award of attorney fees on appeal pursuant to Idaho Code Section 12-120, 12-121 & 12-123?	5
III.	ATTORNEY FEES ON APPEAL	6
IV.	ARGUMENT	7
	A. Standard of Review	7
	B. Summary Judgment was Properly Granted in Favor of the Respondents	8
	1. The Non-Judicial Foreclosure Sales Should Not Be Set Aside	8
	2. Spencer is Not Entitled to Any Alleged Surplus	10
	a. Facts	10
	b. Credit Bids	10
	c. Distribution	13
	d. Equity	14
	e. Personal Property	15
	f. \$5,000.00	16
IV.	CONCLUSION	17

TABLE OF CASES AND AUTHORITIES

CASES:

<u>Carrier v. Lake Pend Oreille School District #84</u> , 142 Idaho 804, 806, 134 P.3d 655, 657 (2006)	8
<u>Federal Home Loan Mortgage Corporation v. Appel</u> , 143 Idaho 42, 45, 137 P.3d 429, 432 (2006)	11
<u>Gunter v. Murphy’s Lounge, LLC</u> , 141 Idaho 16, 105 P.3d 676 (2005)	6
<u>Nelson v. Anderson Lumber Co.</u> , 140 Idaho 702, 99 P.3d 1092 (2004)	6
<u>Taylor v. Just</u> , 138 Idaho 137, 59, P.3d 308 (2002)	6
<u>Thompson v. Kirsch</u> , 106 Idaho 177, 181-82, 677 P.2d 490 (1984)	11

STATUTES:

Idaho Code § 12-120(3)	6
Idaho Code § 12-121	6
Idaho Code § 12-123	7
Idaho Code § 45-105	11,12
Idaho Code § 45-903	11
Idaho Code § 45-1507	13
Idaho Code § 45-1508	8,9,10

RULES:

I.R.C.P. 54(e)(1)	6
I.R.C.P. 56(b)	7
I.R.C.P. 56(c)	7

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises out of two separate, but related, non-judicial foreclosure sales. Petitioner, Larry Spencer ("Spencer"), defaulted on two separate promissory notes and the two underlying deeds of trust. Respondent, Davidson Trust Company, Custodian for IRA/SEP Account No. 68-0811-30 ("Davidson Trust"), was the beneficiary under both deeds of trust. The Successor Trustee, James Raeon, initiated non-judicial foreclosure proceedings pursuant to both deeds of trust. Davidson Trust was the high bidder at both non-judicial foreclosure sales and was given Trustee Deeds to the underlying real property.

Spencer filed the present action claiming "irregularities" in both non-judicial foreclosure sales. Spencer sought a declaratory judgment to set aside and reschedule the sales and monetary damages in the form of an alleged surplus of funds from the two sales. Respondent Dee Jameson ("Jameson") has been named individually and his only association to this case is that he is a beneficiary of the IRA/SEP account held by Davidson Trust. The Successor Trustee, James Raeon, is named as a Defendant but has never appeared in the action.

B. COURSE OF PROCEEDINGS BELOW

Spencer filed the underlying Complaint for Declaratory Judgment and Damages on April 27, 2006. (Clerk's Record on Appeal "R.", p. 1).

Spencer filed an Amended Complaint for Declaratory Judgment and Damages on the same date. (R., p. 26).

Counsel for Jameson filed a Notice of Appearance on May 17, 2006. (R., p. 39).

Counsel for Davidson Trust filed a Notice of Appearance on May 18, 2006. (R. p. 41).

Jameson filed an Answer to the Amended Complaint and Affirmative Defenses on June 20, 2006. (R., p. 43).

Jameson submitted discovery, including Request for Admissions, to Spencer on July 26, 2006. (Clerk's Augmented Record on Appeal "AR.", p. 41).

Spencer responded to the Request for Admissions on August 29, 2006. (AR., p. 41).

Jameson filed a Motion for Summary Judgment along with a Memorandum and supporting Affidavits on November 3, 2006. (AR., pp. 15, 17, 28, & 32).

On January 16, 2007, Spencer filed a Memorandum in Opposition to Jameson's Motion for Summary Judgment along with supporting Affidavits. (AR., pp. 52, 75 & 94).

Jameson filed a Reply to Spencer's Memorandum in Opposition to Jameson's Motion for Summary Judgment on January 23, 2007. (AR., p. 98).

On January 26, 2007, Davidson Trust filed a joinder in Jameson's Motion for Summary Judgment. (R., p. 55).

The District Court heard oral arguments on January 29, 2007. (Tr. P. 4, Ln. 18).

On March 1, 2007, Davidson Trust filed an Answer to Amended Complaint. (R., p. 64).

On March 6, 2007, the District Court issued a Memorandum Opinion and Order granting Jameson's Motion for Summary Judgment as it applies to all defendants. (R., p. 72).

On March 20, 2007, Spencer filed a Motion for Clarification and Reconsideration. (AR., p. 117).

Jameson and Davidson Trust each filed a Response to Spencer's Motion for Reconsideration and Clarification. (AR., pp. 139 & 148).

The District Court heard oral arguments on Spencer's Motion for Reconsideration/Clarification on May 22, 2007. (Tr. P. 3, Ln. 4-7).

At the hearing, the District Court requested additional factual statements and legal authority from the parties before rendering its opinion. (Tr. P. 25, Ln. 8-15 and Tr. P. 26, Ln. 14-20).

The parties submitted the requested briefing on or before May 29, 2007. (AR., pp. 151, 158 & 165).

On July 25, 2007, the District Court entered its Memorandum Opinion and Order denying Spencer's Motion for Reconsideration and Clarification. (R., p. 82).

Spencer filed the present appeal on August 17, 2007. (R., p. 90).

C. STATEMENT OF FACTS

1. On or about April 30, 2002, Spencer executed a promissory note in favor of Davidson Trust agreeing to repay the amount of \$90,000.00. (AR., p. 32).
2. The obligation under this promissory note was secured by a deed of trust for the following described parcels of real property in Kootenai County, Idaho:

PARCEL 1:

Lot 1, Block 1, BIG TIMBER, according to the plat recorded in Book "G" of Plats at Page 457, records of Kootenai County, Idaho.

PARCEL 2:

Lot 2, Block 1, BIG TIMBER, according to the plat recorded in Book "G" of Plats at Page 457, records of Kootenai County, Idaho.

PARCEL 3:

The South half of the Northeast quarter of the Southeast quarter of the Southeast quarter of Section 7, Township 52, North, Range 3 West, Boise Meridian, Kootenai County, Idaho, less U.S. Highway 95. Formerly known as Block 11, Spokane Valley Commercial Orchard Tracts.

Together with 1981 Skyline Mobile Home, 24x56, Vin #01910302P

(hereinafter collectively referred to as the "Real Property") (This entire transaction is hereinafter referred to as the "First Deed of Trust"). (AR., pp. 32-33).

3. On November 14, 2002, Spencer executed a second promissory note in favor of Davidson Trust agreeing to repay the additional loaned amount of \$65,000.00. (AR., p. 33).

4. The obligation under the second note was secured by a deed of trust only on Parcel 3, above. (This entire transaction is hereinafter referred to as the "Second Deed of Trust") (AR., p. 33).

5. In relation to the Second Deed of Trust, Spencer and Davidson Trust entered into a "Loan Commitment Agreement" whereby Spencer agreed to make several enumerated improvements to the Real Property and funds would be released to him upon completion of each item. (AR., pp. 34 & 36-38).

6. Michael Thompson, an unrelated third person and not a party to the present action, subordinated his lien on the Real Property to both the First Deed of Trust and the Second Deed of Trust. (AR., pp. 135-138).

7. Spencer defaulted on his repayment obligation under both the First Deed of Trust and Second Deed of Trust and non-judicial foreclosure proceedings were initiated by the Successor Trustee, James Raeon. (AR., pp. 29 & 46).

8. On February 24, 2005, two separate non-judicial foreclosure sales were held at the Successor Trustee's office. (AR., p. 29).

9. The sales were conducted in reverse chronological order. The sale under the Second Deed of Trust was conducted at 10:00 a.m. (AR., p. 29).

10. Spencer did not attend this sale. (AR., p. 29).

11. As of February 24, 2005, the total obligation owed by Spencer pursuant to the Second Deed of Trust, inclusive of all costs, interest and fees, was \$86,507.45. (AR., p. 87).
12. Davidson Trust submitted a credit bid in the amount of \$86,507.45. (AR., pp. 29 & 87).
13. Davidson Trust's bid at the Second Deed of Trust sale was the highest and Davidson Trust was given a Trustee's Deed to parcel 3. (AR., p. 29).
14. The sale under the First Deed of Trust was conducted at 10:30 a.m. (AR., p. 29).
15. Spencer did attend this sale. (AR., p. 29).
16. As of February 24, 2005, the total obligation owed by Spencer pursuant to the First Deed of Trust, inclusive of all costs and fees, was \$117,566.92. (AR., p. 88).
17. Davidson Trust submitted a credit bid in the amount of \$204,074.37, which included the amounts due under both the First Deed of Trust and Second Deed of Trust. (AR., pp. 29 & 88).
18. Spencer bid \$10.00 at the sale. (AR. p. 29).
19. Davidson Trust's bid at the First Deed of Trust sale was the highest and Davidson Trust was given a Trustee's Deed to the Real Property. (AR., pp. 29-30).
20. The Trustee's Deeds for the First Deed of Trust sale and Second Deed of Trust sale were recorded at 11:29 a.m. and 11:30 a.m. on February 24, 2005. (R. pp. 18-19; 20-22).

II. ISSUES PRESENTED ON APPEAL

- A. Whether Jameson is entitled to an award of attorney fees on appeal pursuant to Idaho Code Section 12-120, 12-121 & 12-123?
- B. Whether the District Court properly granted Summary Judgment in favor of the Defendants?

III. ATTORNEY FEES ON APPEAL

The award of attorney fees is not warranted every time a commercial transaction is remotely connected with the case. Rather, the test is whether the commercial transaction comprises the gravamen of the lawsuit. Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. Gunter v. Murphy's Lounge, LLC, 141 Idaho 16, 105 P.3d 676 (2005).

In Taylor v. Just, 138 Idaho 137, 59, P.3d 308 (2002), Taylor filed a lawsuit seeking a declaratory judgment and an order directing a trustee of a nonjudicial foreclosure sale to execute and deliver a trust deed to him as the highest bidder at the sale. Taylor was the prevailing party at the lower court level and was awarded attorney fees pursuant to 12-120(3). The Idaho Supreme Court reversed the lower court's ruling, but in doing so, awarded the trustee its costs and attorney fees because it found that the non judicial foreclosure sale was a commercial transaction. The same result should apply in the present case.

In addition, Idaho Code § 12-121 provides for an award of attorney fees to the prevailing party. "Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation." IRCP 54(e)(1). "This determination rests in the sound discretion of the trial court. When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason." Nelson v. Anderson Lumber Co., 140 Idaho 702, 99 P.3d 1092 (2004).

Idaho Code § 12-123 further provides for an award of attorney fees for frivolous conduct in civil actions. Frivolous conduct means filing a civil action that is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. I.C. § 12-123.

From the outset, Dee Jameson has objected to being named in his individual capacity in this lawsuit. Mr. Jameson, individually, is not named in any of the numerous contracts, notes or deeds of trusts that make up the underlying commercial transaction. Mr. Jameson's only relationship to this case is that he is the beneficiary of the IRA/SEP account. Neither of the co-defendants made concerted efforts to defend the claims. As such, Mr. Jameson took it upon himself to file an answer, discovery and the motion for summary judgment. Clearly a claim against Mr. Jameson, individually, is not supported by the facts or warranted under existing law and he requests an award of reasonable attorney fees in this regard.

IV. ARGUMENT

A. Standard of Review.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in that party's favor as to all or any part thereof. Rule 56(b), Idaho Rules of Civil Procedure. The judgment sought shall be forthwith rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), Idaho Rules of Civil Procedure.

The Idaho Supreme Court has held:

When reviewing a motion for summary judgment, this Court uses the same standard employed by the trial court when deciding such a motion. 'If the pleadings, depositions,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law' summary judgment is proper. The burden is on the moving party to prove an absence of genuine issues of material fact. In addition, this Court views the facts and inferences in the record in favor of the non-moving party.

Carrier v. Lake Pend Oreille School District #84, 142 Idaho 804, 806, 134 P.3d 655, 657 (2006) (Citations Omitted).

B. Summary Judgment was Properly Granted in Favor of the Respondents.

There are no genuine issues of material fact and Respondents are entitled to a judgment as a matter of law. Spencer filed the present action seeking two different remedies. First, Spencer asked the District Court to set aside the non-judicial foreclosure sales and reschedule them for another sale. In the alternative, Spencer asked the District Court to award him an alleged surplus of money arising out of the foreclosure sale bids. However, the record clearly shows that Spencer is not entitled to either relief.

1. The Non-Judicial Foreclosure Sales Should Not Be Set Aside.

Spencer alleges that there were "irregularities" and the District Court should have ordered that the foreclosure sales be rescheduled. However, Spencer has offered no authority which would give the courts the power to reschedule the non-judicial foreclosure sales at issue. In fact, the Idaho statutes are quite clear:

FINALITY OF SALE. A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under section 45-1506, Idaho Code, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. The failure to give notice to any of such persons by mailing, personal service, posting or publication in accordance with section 45-1506, Idaho Code, shall not affect the validity of the sale as to persons so notified nor as to any such persons having actual knowledge of the sale. Furthermore, any failure to comply with the provisions of section 45-1506, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof.

I.C. § 45-1508 (Emphasis added).

Spencer's Amended Complaint makes no allegations that he did not receive adequate notice of the foreclosure sales at issue in this case. (R., pp. 26-38). In fact, Spencer has admitted in discovery that he is not making any claims based upon the form, content or service of the notices of foreclosure sales in this case.

"REQUEST FOR ADMISSION NO. 17: Please admit you received all notices of foreclosure sale to which you were entitled pursuant to Idaho law.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 18: Please admit you are not making any allegations in the present action as to the form, content or service of any of the foreclosure notices issued by the Trustee in this case.

RESPONSE: Admit."

(AR, p. 47).

Spencer's own admissions show that he received all notices of the non-judicial foreclosure sales at issue in the present case. Spencer did not appear at the first sale, but he did appear at the second sale. He was provided the opportunity to bid at the second sale and he only bid \$10.00. He was outbid by Davidson Trust and his interest in the property has been terminated pursuant to the clear language of Idaho law.

In his Brief on Appeal, Spencer states "Davidson Trust argued it is a bona fide purchaser and the non-judicial sales are final." (Spencer's Brief on Appeal, p. 24). This statement is incorrect for several reasons. First, the Defendants have never argued they are bona fide purchasers. He is apparently referring to the last sentence in I.C. § 45-1508. But, the statute has three sentences with three separate and distinct meanings. The first sentence states that notice of the foreclosure sale effectively terminates all interests of that person after the sale is

completed. The second sentence states that failure to give notice shall not affect the validity as to those who actually received notice. Spencer admits he received the notices of the foreclosure sales and even attended one of the sales. As such, the first two sentences of I.C. § 45-1508 effectively terminate his interest therein. The last sentence states that even if a person did not get notice of the sale, their interest is terminated against a bona fide purchaser. This is not applicable because Spence admittedly received notice of the sale. As such, the non-judicial foreclosure sales should not be set aside and rescheduled.

2. Spencer is Not Entitled to Any Alleged Surplus.

a. Facts

The foreclosure sales were done in reverse chronological order. The foreclosure sale pursuant to the Second Deed of Trust (Parcel 3) occurred first at 10:00 a.m. on February 24, 2005. Spencer did not attend this sale. Davidson Trust submitted a credit bid of the then remaining balance owed, \$86,507.45, and was awarded a Trustee's Deed.

The foreclosure sale pursuant to the First Deed of Trust (Parcels 1, 2 & 3) occurred a short time later at 10:30 a.m. Spencer did attend this sale and bid \$10.00. Davidson Trust submitted a credit bid of the then remaining balance owed under the First and Second Deeds of Trust, \$204,074.37. Davidson Trust was the high bidder and was given a Trustee's Deed to the Real Property. The Trustee's Deeds for both sales were recorded an hour later.

b. Credit Bids.

There is no question that Idaho law allows for the use of credit bids in foreclosure sales. The Idaho Supreme Court has stated:

The principle articulated in the above-cited cases is compatible with I.C. § 45-1506 and, indeed, it makes a good deal of practical sense. There is no reason why the holder of the deed of trust note should not be able to purchase the property at a trustee sale by bidding in all or part of the amount owing pursuant to the note. After all, the holder of the note is

the party to be benefited by the sale. It makes no sense to require the note holder to bring cash to the sale in order to pay himself. His bid, if successful, immediately reduces or eliminates the debtor's obligation. We hold where the holder of the deed of trust note is the bidder, crediting the bid against the note is the equivalent of a cash sale. The district court properly held that the credit bid here complied with the statutory requirements.

Federal Home Loan Mortgage Corporation v. Appel, 143 Idaho 42, 45, 137 P.3d 429, 432 (2006).

The question then becomes whether Davidson Trust could combine the amounts due under both Deed of Trusts as a credit bid at the second sale. Idaho law allows for the combination of bids at a foreclosure sale:

Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as part of the claim for which his own lien exists.

Idaho Code § 45-105.

In Thompson v. Kirsch, 106 Idaho 177, 181-82, 677 P.2d 490 (1984), the Idaho Supreme Court expanded on the issue of combining foreclosure bids:

Idaho Code § 45-903 provides: "The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession." Since the second deed of trust held by the Thompsons was functionally equivalent to a mortgage, we hold that the Thompsons' lien was special. Accordingly, I.C. § 45-105 entitled them to include payments they made to prevent foreclosure of the first deed of trust as part of the mortgage indebtedness created by their junior encumbrance. See also Miller v. Stavros, 174 So. 2d 48, 49 (Fla. Dist. Ct. App. 1965) (holding that "amounts paid by the holder of a second mortgage to protect his security are properly included in a decree foreclosing the second mortgage"). Moreover, the deed of trust signed by Mr. Kirsch specifically required him, as one of the grantors, to pay when due "all [prior] encumbrances, charges and liens, with interest." It authorized the Thompsons to make such payments when deemed necessary to protect the security of the second deed of trust. Finally, it gave the Thompsons the right to recover such advances from the grantors "with interest from the date of expenditure at eight percent per annum."

Thompson, 106 Idaho at 181-82.

Admittedly, this is not a case of a junior lienor paying off a senior lien. But, the analogy is still applicable because this case presents the unique circumstance where the holder of the two

most senior lien positions on the Real Property *is the same entity*. When a junior lienor pays off the senior lien, the junior lienor then puts themselves in the situation of having the two most senior liens. This is functionally equivalent to what was done in this case.

Immediately prior to the first sale, Davidson Trust was owed a combined \$204,074.37 from Spencer. At the first sale, Davidson Trust bid \$86,507.45, the amount owed under the second note. At the second sale, Davidson Trust needed to protect its rights by bidding not only the \$117,566.92 held by Davidson Trust as the senior lienholder, but also the \$86,507.45, the “part of the lien for which his own lien exists.” See Idaho Code § 45-105.

An argument could also be made that the Second Deed of Trust and the subsequent sale were superfluous. The First Deed of Trust specifically states that it is entered into “to secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor herein, or any or either of them, while record owner of present interest, for any purposes, and of any notes, drafts or other investments representing such further loans, advances or expenditures together with interest on all such sums as at the rate therein provided.” (R, p. 14). This language, in and of itself, allows Davidson Trust to bid the full \$204,074.37 at the second sale.

Spencer argues that allowing a combination of credit bids would give a note holder a virtual blank check to bid at the foreclosure sales and would have a chilling effect on the ability for others to bid. (See Spencer’s Brief on Appeal, p. 25-26). However, Davidson Trust is not arguing that it can just pick any number out of the air and submit it as its own bid. Davidson Trust was owed \$204,074.37 prior to the first sale. How much did Davidson Trust bid at the second sale? \$204,074.37. This does not have a chilling effect on others’ ability to bid. If Spencer

had bid \$204,074.38, he would have held title to all three parcels and Davidson Trust would have received all of its money back. Everyone benefits under this scenario.

c. Distribution.

Further, it makes practical sense to allow the combination of credit bids when the two most senior lienholders are the same entity because of the distribution statutes. The Idaho Code states:

The trustee shall apply the proceeds of the trustee's sale as follows:

- (1) To the expenses of the sale, including a reasonable charge by the trustee and a reasonable attorney's fee.
- (2) To the obligation secured by the trust deed.
- (3) To any persons having recorded liens subsequent to the interest of the trustee in the trust deed as their interests may appear.
- (4) The surplus, if any, to the grantor of the trust deed or to his successor in interest entitled to such surplus.

Idaho Code § 45-1507.

In this case, Davidson Trust bid \$204,074.37 at the second sale. The Trustee would apply these proceeds first to the expenses of the sale and the amount owed under the First Deed of Trust (\$117,566.92). The remaining balance (\$86,507.45) would be applied to the next lien in line. There is no dispute that the Trustee's Deed issued after the first sale was not recorded until 11:30 a.m. As such, the Second Deed of Trust was still a lien and senior to all other liens. After this distribution of \$86,507.45, there is no surplus to distribute to Spencer or any other third party.

Spencer's Amended Complaint also alleges, incorrectly, that he is entitled to the surplus proceeds. (R, pp. 35-37). But, Michael Thompson was the holder of a junior deed of trust on Parcels 1 & 3. (AR, p. 124). Thompson subordinated his interest in favor of both the First Deed

of Trust and the Second Deed of Trust. (AR, p. 135-138). Both subordination agreements have nearly identical language:

WHEREAS, it is a condition precedent to obtaining said loan that said deed of trust last above-mentioned shall unconditionally be and remain at all times a lien or charge upon the land hereinbefore described, prior and superior to the lien or charge of the deed of trust first above-mentioned;

...

(1) That said deed of trust securing said note in favor of Lender, and any renewals or extensions thereof, shall unconditionally be and remain at all times a lien or charge on the property therein described, prior and superior to the lien or charge of the deed of trust first above-mentioned.

(Id.) (Emphasis added).

These subordination agreements show two things. First, the Second Deed of Trust had priority over Thompson's deed of trust even though the sale had been completed. The Second Deed of Trust was **unconditionally, at all times, a prior and superior lien** to Thompson's lien. In addition, this also shows that Spencer would not be entitled to any surplus under the distribution statutes. Thompson would be ahead of Spencer if, hypothetically, there was any surplus money to distribute. Therefore, Spencer has failed to state a claim for which relief can be granted. (R., p. 49).

d. Equity

There would be an inequitable result assuming Davidson Trust was only allowed to bid \$117,566.92 at the second sale. If Spencer (or any third party for that matter) bid even one penny more than Davidson Trust, Spencer would be given title to the three parcels and Davidson Trust would have received \$117,566.92.

But, the central question the court needs to ask itself: **What happened to the \$86,507.45 Davidson Trust loaned pursuant to DOT 2?**

The IRA/SEP account cannot pursue a deficiency balance because DOT 2 has been foreclosed. As such, Spencer walks away from a total indebtedness of \$204,074.37, after paying only \$117,566.92. He defaults on two separate promissory notes and has the ability to walk away from the \$86,507.45 without paying a dime. Quite simply, the IRA/SEP account had no choice but to bid \$204,074.37 at the second sale in order to protect its security. If it did not bid this amount and was outbid by Spencer, or any other third party, it would lose \$86,507.45. This would be an unjust result for the Respondents.

The same inequities would apply if the Court declared, as requested by Spencer, that \$290,581.82. Spencer is asking the Court for Davidson Trust to pay him \$86,507.45 after he defaulted on not one, but two different promissory notes.

e. Personal Property.

The character of the mobile home as real property or personal property has no bearing on this case. The non-judicial foreclosure sales complied with all aspects of I.C. § 45-1502, et seq. Spencer was loaned \$90,000.00 under the First Deed of Trust. As collateral, he voluntarily signed the First Deed of Trust, which included a reference to his mobile home. (See R., pp.14-15). Spencer defaulted on the underlying note and the Successor Trustee began non-judicial foreclosure proceedings. The Successor Trustee foreclosed on the four corners of the Deeds of Trust. Spencer received all notices to which he was entitled and he even appeared at the second sale. The fact that there was a reference to a mobile home does not invalidate the proper procedures taken pursuant to the foreclosure statutes. Moreover, any damages he allegedly sustained would be against the Successor Trustee who has never appeared in this action.

f. \$5,000.00

In connection with the Second Deed of Trust the parties entered into a Loan Commitment Agreement whereby Davidson Trust held back the sum of \$42,500.00 and would disperse the funds to Spencer upon seven enumerated items related to improvement of the secured property. There is no dispute that Spencer completed items (a) through (f) on the Loan Commitment Agreement and was paid \$37,500.00.

Spencer is also not disputing the fact that he did not complete item “(g): Mobile remodel costs, including windows, carpets, drywall, etc. (to be paid upon completion).” He did not complete the condition of the contract, so \$5,000.00 was not dispersed to him.

But, the issue of the \$5,000.00 is a red herring and does not create a genuine issue of material fact for two reasons. First, this money is still charged to the account of Spencer because its intended use was to improve the secured property. It was not the property of Davidson Trust. It was held in trust until Spencer completed the item (g). If Spencer had, at any time, provided Davidson Trust with sufficient evidence that he completed item (g), he would have received his \$5,000.00. But, he admits he never did this. DOT 2 specifically allows Davidson Trust to make any advances necessary to protect the security interest and charge the account of Spencer. Spencer failed to perform his duty under the contract and Davidson Trust was required to remodel/repair the mobile home and expended the \$5,000.00 in doing so. This situation is no different than Spencer agreeing to pay all property taxes when due. He did not pay the property taxes and they were charged to his account.

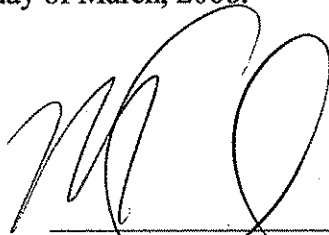
Perhaps more importantly, Spencer would not even be entitled to the \$5,000.00 if it had created a surplus. An individual by the name of Mike Thompson held a junior lien in the Property. Mr. Thompson unconditionally subordinated his interest in the Property to both Deeds

of Trust held by Davidson Trust. If the \$5,000.00 created a surplus, it would have gone to Mr. Thompson, not Spencer. Mr. Thompson is not a party to the present action. As argued before the lower court, it is doubtful Spencer was even a real party in interest to begin the proceedings.

V. CONCLUSION

There are no genuine issues of material fact and the Respondents were properly granted a judgment as a matter of law. The non-judicial foreclosure sales terminate all of Spencer's interest in the Real Property because Spencer admits he receive all notices to which he was entitled. As such, the non-judicial foreclosure sales are final and should not be rescheduled. In addition, Spencer is not entitled to any alleged surplus from the non-judicial foreclosure sales. Davidson Trust properly submitted a credit bid for the amounts owed under both the First Deed of Trust and Second Deed of Trust. As such, there was no surplus to distribute. Even if there was an alleged surplus, there was at least one other person, not a party to the present action, who had priority over Spencer. As such, Spencer fails to state a claim upon which relief can be granted. It is therefore respectfully requested that the Court affirm the decision of the lower court.

DATED this 3 day of March, 2008.

A handwritten signature in black ink, appearing to read 'M. R. Chapman', is written over a horizontal line.

MICHAEL R. CHAPMAN
Attorney for Respondent Dee Jameson

CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of March, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ian D. Smith
Attorney at Law
PO Box 3019
Coeur d'Alene, ID 83816

☒ U.S. MAIL
☐ HAND DELIVERED
☐ FAX to: 765-9089

Barry McHugh
Elsaesser, Jarzabek, et al
1400 Northwood Center Court, Suite C
Coeur d'Alene, ID 83814

☒ U.S. MAIL
☐ HAND DELIVERED
☐ FAX to: 667-2150



Michael R. Chapman